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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 755.

WALTER K. RIEDEL,
Petitioner,

vs.

ATLAS VAN LINES, INC., and KNOWLES STORAGE & MOVING COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW AND JURISDICTIONAL STATEMENT.

Respondents do not take issue with petitioner's reference to the opinions delivered in the courts below, nor to the jurisdictional statement.

QUESTION PRESENTED FOR REVIEW.

Is a driver, who was employed to drive a tractor-trailer unit, acting within the scope of his employment while driving an automobile owned by a garageman, who had contracted to repair the tractor, where the trip was made without the knowledge of, and therefore not under the control nor subject to the right of control of, the alleged employer?

The foregoing question differs from that contained in the petition because respondents feel that the question as phrased in the petition does not fairly and fully conform to the issue actually presented by the circumstances of the case.

STATEMENT OF THE CASE.

Respondents find it necessary to make this additional statement of the case in order to correct certain inaccuracies and omissions in the statement of petitioner.

On page 4 of the petition the statements are made that Harris, the truck driver, was to have the truck repaired in case of a breakdown and that he had authority to order the repairs. This is incorrect. In case of breakdown, Harris was to take the truck to a garage for repairs. In case of a minor repair, he had been instructed to go ahead and have it done, but in case of a major repair, such as was here involved (Supp. R. 1), Harris was instructed to call McGuire, the Knowles executive (R. 24).

On page 5 of the petition, petitioner states: "Tracy and Harris then drove in Tracy's pickup truck to Kansas City to obtain the new shortblock (R. 20). They bought the new shortblock in Kansas City and drove back to Rich

Hill (R. 20)." The inference could be drawn therefrom that Harris drove the pickup truck to Kansas City and/or bought the shortblock, neither of which statements is correct. Tracy drove the truck and purchased the shortblock (Supp. R. 2). Harris merely went along for the ride (Supp. R. 2).

At page 6 of the petition, the statement is made that McGuire told Harris "to see the job was done". Actually, McGuire's words were, "to see that the job was done, *have it done, yes*", (Partial transcript, 74). The emphasized words, added to those quoted by the petitioner, constitute the complete answer of the witness.

At page 7, petitioner poses three questions, which he denominates as the issues in the case. Actually, the sole issue is:

Was Harris, at the moment of the collision, acting within the scope of his employment?

ARGUMENT.

I.

The Petition Fails to Comply with Rule 19 of This Court, in That (a) It Contains No Statement That the Court of Appeals Has Decided an Important State Issue in a Way in Conflict with Applicable State Law, and (b) It Contains No Showing of Special and Important Reasons to Justify the Granting of the Writ.

Nowhere in the petition is the statement to be found that the Court of Appeals has decided an important state issue in a way in conflict with applicable state law.

Petitioner, at page 7, admits that the agency question in this case is governed by Missouri law. However, he takes the position that "the question has not been answered in Missouri". He attempts to distinguish four of the Missouri cases upon which the Court of Appeals relied (making no mention of the fifth case, *Stokes* v. *Four State Broadcasters, Inc.*, Mo. Sup., 300 S.W.2d 426), and urges that this Court issue the writ "in order that his (petitioner's) cases and general principles of law can comprehensively be reviewed" (Petition, page 8).

We respectfully submit that the action suggested is not a proper function of this Court in view of the statements contained in the petition.

As was pointed out by Mr. Justice Frankfurter, in *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 73, 74, 99 L. Ed. 897, 901, 75 S. Ct. 614:

> "This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Acts of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925."

Since this case is governed solely by Missouri law, and no federal question is presented, this Court should only grant certiorari where the petition recites and shows that the decision of the Court of Appeals conflicts with applicable state law. The absence of such recital is violative of Rule 19, subsection (b). Therefore, the Court should not grant the writ.

Further, the petition fails to state special or important reasons for review.

This is required not only by Rule 19 but by several decisions of this Court. In speaking of the necessity of questions of gravity and importance incident to consideration of this Court through certiorari, Mr. Chief Justice Fuller, in *Ex parte Woods*, 143 U.S. 202, 126, 36 L. Ed. 125, 126, 12 S. Ct. 417, observed:

> "This must necessarily be so in any view, and especially when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation which impeded the examination and disposition of cases of public concern and delayed suitors in the pursuit of justice."

As was noted in *Rice* v. *Sioux City Cemetery*, *supra* (349 U.S. 70, 74, 99 L. Ed. 897, 901, 75 S. Ct. 614):

> "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Clearly, this case involves a matter of importance only to the litigants. Therefore, its determination should be left to the Court of Appeals.

II.

The Granting of the Writ Would Serve No Useful Purpose Because Normally This Court Defers to the Decision of the Court of Appeals in the Interpretation of Local Law.

As was stated in *Huddleston* v. *Dwyer*, 322 U.S. 232, 237, 88 L. Ed. 1246, 1249, 64 S. Ct. 1015:

> "The decisions of the highest court of a state are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."

Again, as was observed by Mr. Justice Douglas in *Palmer* v. *Hoffman*, 318 U.S. 109, 118, 87 L. Ed. 645, 652, 63 S. Ct. 477, 144 A.L.R. 719, rehearing denied 318 U.S. 800, 87 L. Ed. 1163, 63 S. Ct. 757:

> "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

The doctrine is well established in other cases, such as *General Box Co.* v. *United States*, 351 U.S. 159, 165, 100 L. Ed. 1055, 1061, 76 S. Ct. 728, rehearing denied 351 U.S. 990, 100 L. Ed. 1502, 76 S. Ct. 1044; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534, 93 L. Ed. 1520, 1524, 69 S. Ct. 1233, rehearing denied 338 U.S. 839, 94 L. Ed. 513, 70 S. Ct. 33; *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 529, 530, 2 L. Ed.2d 953, 958, 78 S. Ct. 893, rehearing denied 357 U.S. 933, 2 L. Ed.2d 1375, 78 S. Ct. 1366, and the recent case of *Goett* v. *Union Carbide Corp.*, ... U.S. ....., 4 L. Ed.2d 341, 344, 80 S. Ct. .....

Both sides agree that this case is governed by local law (Petition, page 7). The Court of Appeals, in rendering its decision, necessarily interpreted local law. There being nothing unusual about the case, it would be expected that this Court defer to the decision of the Court of Appeals. Therefore, it would seem that no useful purpose would be served by granting the writ.

III.

The Decision Below Is Clearly Correct.

Petitioner insists, at page 8 of the petition, that because Harris was driving an automobile at the time of the accident, and he had originally been employed to drive a a truck, his master was subjected to no greater risk, and therefore, Harris was within the scope of employment. It

is not clear to which alleged master petitioner refers. He then attempts to distinguish four of the five cases cited by the Court of Appeals upon the sole ground that in none was the servant employed to drive a motor vehicle. His motive in failing to mention the fifth case, *Stokes* v. *Four-States Broadcasters, Inc.*, Mo. Sup., 300 S.W.2d 426, becomes apparent when that case is read, and the facts reveal that both the alleged principal and the alleged agent contemplated that an automobile be used to do the very act which the plaintiff therein urged created the agency relationship.

Be that as it may, all of the Missouri cases cited by the Court of Appeals apply the well-established test of whether, at the moment at which the controversy arises, the act then being done is one which the alleged agent was employed to do.

The duties of Harris were unequivocally stated by Mr. McGuire of Knowles to be cross-country moving, loading and unloading of household goods and furniture, driving the truck, and in some instances, collecting C.O.D. charges (Supp. R. 2). This evidence was not controverted. He was not an automobile mechanic (Supp. R. 1). He took no part in taking the pan off the motor, nor doing any of the repair work thereto (Supp. R. 1). Why? Because these were the very things which motivated him to take the tractor to Tracy Brothers Garage in the first place. Once he had done this, his only duty was to wait until the repairs were completed (Supp. R. 1).

Petitioner makes much of the fact that Harris' use of the automobile was designed to hurry the repairs to the tractor and get the load of furniture more quickly on the road, all to the benefit of Atlas and Knowles. However, as was pointed out in *Oganaso* v. *Mellow*, 356 Mo. 228, 201 S.W.2d 365, 368:

> "The fact that the employee's act was for the employer's benefit is not, in itself, determinative that the act was in the scope of the employment."

This Missouri rule was recognized by the Court of Appeals in this case (272 F.2d 901, 903).

CONCLUSION.

The petition for certiorari discloses no statement that the decision of the Court of Appeals conflicts with applicable Missouri law. Therefore, on this basis alone, it fails to come within the provisions of Rule 19 and should be denied. Moreover, even if granted, no useful purpose would be served, because the parties agree that the decision of the Court of Appeals is nothing more than an interpretation of local law, and being such, normally will be given deference by this Court. The Court of Appeals reached its decision after careful consideration of the several Missouri cases controlling the issue here involved. We suggest that the petition be denied.

Respectfully submitted,

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